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No. 10

IN THE
Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (Successor by Merger to Agripost, Inc.) and AGRI-DADE, LTD., a Florida Limited Partnership, *Petitioners*,

v.

MIAMI-DADE COUNTY, FLORIDA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank* insofar as it denies property owners the right to litigate their *federal* causes of action in *federal* court, the same as all other constitutionally aggrieved citizens, and forces them to seek compensation in state court ostensibly to ripen their federal constitutional takings claims, where four Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that the *Williamson County* rule is "mistaken" due to its lack of doctrinal underpinning and incoherent effect on federal jurisdiction?

Question 2. Where settled 11th Circuit law has for decades provided that a property owner following the *Williamson County* rule of state court ripening litigation may "reserve" federal issues for federal court trial, and in fact the 11th Circuit expressly so ordered in an earlier appeal of this case, can the property owner be punished for obeying such an order by having its eventual federal court suit dismissed on the basis of issue preclusion?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioners Agripost, LLC, a Florida Limited Liability Company (successor by Merger to Agripost, Inc.) and Agri-Dade, Ltd., a Florida Limited Partnership were the plaintiffs and appellants below.

- Respondent Miami-Dade County, Florida was the defendant and appellee below.

Pursuant to S.Ct. Rule 29.6, Petitioners state that Petitioner Agripost, LLC has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioner Agri-Dade, Ltd.'s principal owner is Agripost Dade County, LLC, a Florida limited liability company which is itself wholly owned by Agripost, LLC. Agripost, LLC is also a general partner and limited partner of Agri-Dade, Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Agripost, LLC, a Florida Limited Liability Company (successor by merger to Agripost, Inc.) and Agri-Dade, Ltd. (collectively "Agripost") petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reproduced as Appendix A, and the denial of rehearing is Appendix G. The Opinion affirms a judgment of the United States District Court, Southern District of Florida, reproduced in Appendix B. Earlier decisions in this matter by the Eleventh Circuit Court of Appeals and the United States District Court, Southern District of Florida are reproduced in Appendices C and D. A decision by the Florida Court of Appeals (required by the Eleventh Circuit decision in Appendix C) and an Order of the Florida Supreme Court denying review are reproduced in Appendices E and F.

JURISDICTION

The Eleventh Circuit entered judgment on April 22, 2008, and denied a timely petition for rehearing on May 30, 2008.

On August 14, 2008, this Court granted an application (No. 08A132) extending the time to file this petition to October 27, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

This case demonstrates all that is wrong with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and shows clearly why four members of this Court, led by the late Chief Justice, urged that the Court find an opportunity to reconsider *Williamson County* and discard it. (See *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 351 [2005] [concurring opinion by Rehnquist, C.J., joined by O'Connor, Kennedy and Thomas, JJ].)

Briefly, *Williamson County* has created a Catch-22 of monumental proportions for property owners seeking to litigate 5th Amendment takings cases in federal court. *Williamson County* tells property owners that they *must first* litigate parallel state claims in state court in order to "ripen" their federal claims for federal court litigation. Upon doing so, however, their access to federal court is prevented by the doctrines of claim and/or issue preclusion. That is what happened in *San Remo* — triggering four Justices to urge reconsideration of *Williamson County* to end that procedural conundrum.

Petitioners here have been in litigation for a decade and a half, bouncing between state and federal courts as a result of this Court's decision in *Williamson County* and the 11th Circuit's settled rule applying *Williamson County* that required property owners who wanted to litigate a regulatory taking claim in federal court to first litigate that claim in state court, under state law, with a "reservation" of federal issues. (E.g., *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299 [11th Cir. 1992]. See App. p. 10, referring to *Fields* as "the settled law in this circuit.") [1]

After filing suit in U.S. District Court, Petitioners were ordered to proceed in state

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[1] The importance of a fresh federal trial was recognized by the Court in the abstention context: "How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. . . . Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination . . . [nor of] his right to litigate his federal claims fully in the federal courts.*" (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1963]; emphasis added.)

court under the *Fields* rule and then return. The 11th Circuit affirmed the District Court's Order so holding. The County then petitioned this Court for certiorari, which was denied.

After litigating unsuccessfully in the Florida courts — but reserving their right to litigate federal issues in federal court, as the 11th Circuit had directly ordered them to do — Petitioners returned to U.S. District Court, where they were told that the Florida proceedings had become res judicata. On appeal, the 11th Circuit held that to be error, but concluded that collateral estoppel would preclude the litigation in any event.

Petitioners were the victims of a judicial double whammy. Having filed suit in federal court initially, they were ordered to state court under the authority of *Williamson County* and *Fields*. After spending years in that process, they were told by the court that invented the *Fields* process in order to comply with both *Williamson County* and fundamental fairness that it was all for naught. That cannot stand.

STATEMENT OF THE CASE

Agripost was in the business of transforming waste material into useful fertilizer. Miami-Dade County announced a need for a plant to provide such a service and Agripost responded.

It obtained from the County a 20-year contract and a zoning permit for land it leased from the State, and then built the facilities with private funds — more than $36 million.

Later, the County staff notified Agripost that its plant was creating nuisance-like problems and suggested curative steps. After negotiating a timetable for the cure, Agripost set about dealing with the problem. Before allowing Agripost to complete the negotiated program, however, the County revoked the permit. As a consequence of the County's abrupt permit revocation, Agripost's contract with the County to operate the facility was rendered worthless and it lost its lease (forfeiting all the facilities it had built).

Exhausting its administrative remedies, Agripost unsuccessfully sought review of the County's action in Florida's courts.

Agripost then sued in U.S. District Court for redress of its federal constitutional rights but was, pursuant to settled 11th Circuit policy, told to first ripen its case in state court by seeking recompense under state law. In the process, the District Court rejected the County's defenses that the state administrative proceedings (including court review) were either res judicata or collateral estoppel. (App. D.) The *County* then sought 11th Circuit

review, even though it had prevailed and the case had been dismissed. The basis for its appeal was that the District Court's decision would deny it the ability to invoke either claim or issue preclusion. The 11th Circuit affirmed. (App. C.)

Upon litigating in state court as ordered (and losing), Agripost returned, only to have its second federal suit dismissed on the basis of claim preclusion. (App. B.) The 11th Circuit affirmed, concluding that, although claim preclusion did not apply, the matter was barred by issue preclusion. (App. A.)

The 11th Circuit's treatment of *San Remo* is unfathomable. Acknowledging that *San Remo* "was an *issue* preclusion case" (App. p. 13 [emphasis, the court's]), the 11th Circuit said that "we need not extrapolate from the holding in *San Remo* to decide this appeal" (App. p. 13), and then held that issue preclusion controlled without further mention of this Court's issue preclusion analysis in *San Remo*.

Nor did the 11th Circuit deal at all with the impact of its own *Fields* rule and its direct order to Agripost to litigate in state court in order to ripen its federal claim and then return to federal court to litigate its federal issues.

Moreover, having held in the first appeal that the County could not apply either claim or issue preclusion based on the state court findings (App. C), the 11th Circuit allowed the County to do precisely that (App. A).

Rehearing was denied. (App. G.) Thus, this Petition.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

I.

THERE IS CONFLICT AND CONFUSION REGARDING THE ABILITY OF PROPERTY OWNERS TO SUE MUNICIPALITIES IN FEDERAL COURT FOR 5TH AMENDMENT VIOLATIONS. THREE DECISIONS OF THIS COURT INTERTWINE TO PERPETUATE THE CONFUSION.

First. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a property owner's 5th Amendment claim to just compensation for a regulatory taking was not "ripe" for federal court litigation until litigation under parallel state constitutional provisions had been tried and lost.

Second. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant could remove such a 5th Amendment claim from state court for federal litigation. The opinion does not cite *Williamson County* nor the fact that *Williamson County*'s holding renders compliance with 28 U.S.C. § 1441(a) (i.e., that a case can be removed only if it could have been brought in federal court in the first instance) impossible.

The upshot of *Williamson* and *City of Chicago* is that property owners are barred from filing takings claims in federal court, but municipalities have the absolute right to try such claims in federal court by removing them.

Third. In *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), this Court held that, once a case is brought and tried in state court, issue preclusion would prevent prosecuting such a case in federal court, even though the state court litigation had completed the required *Williamson County* ripening — rendering the matter theoretically ready for federal court litigation.

By the time *San Remo* was decided, members of this Court openly questioned the continuing validity of *Williamson County*. The *San Remo* plaintiff did not challenge

Williamson County, instead assuming that it could follow the direction of that case to return to federal court with its then-ripened 5th Amendment claim. As *Williamson County* was not challenged in this Court, the Court simply assumed it was still valid precedent. The late Chief Justice, however, joined by Justices O'Connor, Kennedy, and Thomas, filed a concurring opinion directly asking for such a reconsideration of a ruling they had come to believe "may have been mistaken" (*San Remo*, 545 U.S. at 348):

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (*San Remo*, 545 U.S. at 352 [concurring opinion].)

A.

Williamson County Contained a Fatal Flaw: It Wrongly Assumed That a Fifth Amendment Taking Without Just Compensation is Not Complete Until a State Court Adjudicates That the Local Agency Really Will Not Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316-317 [1987].) There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

That is *Williamson County*'s flaw: it held that the taking was not complete until

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[2] *Chicago B.& Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the *agency* that actually committed the taking and the *State* that may or may not have provided compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like Miami-Dade County at bench — is alleged to have taken private property for public use (i.e.,

in pursuit of a public purpose[3]) and failed to pay for it. If so, the question whether the municipality can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[4]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has

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[3] *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

[4] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[5] and nonpayment by the taker. When a municipal council — like Miami-Dade's — takes private property without providing any compensation, it violates the 5th Amendment then and there. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed. (*Monroe v. Pape*, 365 U.S. 167, 183 [1961] ["It is no answer that the state has a law which if enforced would give relief."])

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350

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[5] Per *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

[1986]; citation omitted; emphasis added.) At another point, the same opinion speaks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."[6]

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English*, 482 U.S. at 320, fn. 10; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated. (*McNeese v. Board of Education*, 373 U.S. 668, 674, n. 6 [1963] ["we have not the right to decline the exercise of . . . jurisdiction simply because the rights asserted may be adjudicated in some other forum."])

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[6] Cf. *Jacobs v. United States*, 290 U.S. 13, 16 (1933): "A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the [5th] Amendment."

Deferring to state courts is tantamount to granting states a veto power over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

Mandating suit in state court imports into the 5th Amendment an unwarranted remedial requirement when the just compensation language is a self-executing limitation on government's inherent power. (*First English*, 482 U.S. at 315.) [7]

If nothing else, any required state court suit for payment is not only inconsistent with 42 U.S.C. § 1983 (*Patsy v. Board of Regents*,

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[7] See also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

457 U.S. 496, 503 [1982]), but also with Congressional policy established in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that it is illegal for government agencies to make it necessary for property owners to sue for just compensation. (42 U.S.C. § 4651[8].) Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or condemnation (42 U.S.C. § 4651[8]). State laws track these provisions. (See Fla. Stat. § 421.55)

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[8]

No other constitutional rights are treated that way. Just as the Constitution forbids

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[8] *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"].)[9]

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[9] The lone exception is habeas corpus, where by statute all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata, collateral estoppel, or full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

As the *San Remo* group of concurring Justices concluded, *Williamson County* contains no principled explanation of "why federal takings claims in particular should be singled out to be confined to state court . . ." (545 U.S. at 351.) Viewing litigation to protect federal rights as a whole, the *San Remo* concurrence put its finger on the right issue:

> "The Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the *First Amendment* [citations]." (545 U.S. at 350; emphasis, the Court's.)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the

Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)

There is no need to sue in State court merely to confirm the self-evident fact of non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. The Agripost litigation has been on-going for some 15 years. The County has made no offer of payment, flouting federal law in the all too evident belief that state courts will not enforce the Takings Clause and the preclusion rule will bar the owners from federal court.[10]

This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That

[10] Such a result is plainly contrary to the intent of the Congress that adopted 42 U.S.C. § 1983 and this Court's consistent application of it. As *Patsy* concluded after exhaustive study of the statute's adoption, Congress had a general "mistrust" of the "local prejudice" in state courts and therefore intended "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." (457 U.S. at 503.)

process consumed 13 years. At no time — even after a jury trial resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Miami-Dade was not in doubt about that claim. It simply chose not to honor it. Imposing on Agripost (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown in *San Remo*, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error,

overrule the state court ripening requirement, and allow Agripost the day in federal court that it initially sought and to which it was entitled *ab initio*.

B.

City of Chicago, Rendered a Dozen Years After *Williamson County*, Added Further Confusion to the "Ripeness" Procedure in Takings Cases.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. In addition to state court claims, the complaint raised federal due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to.

It somehow got overlooked that, as a land use plaintiff, the International College of

Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* forbade it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under' federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being

reminded of *Williamson County*,[11] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[12] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[13] when necessary to clarify the implications of earlier decisions,[14] when decisions of the Court are "if not directly . . .

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[11] In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

[12] *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

[13] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[14] *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[conflicting,] are so in principle,"[15] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[16] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County*.

C.

San Remo Added to the Confusion by Applying *Williamson County* Despite Concerns About its Validity.

By the time *San Remo* reached this Court, the plaintiff had several strikes against it. First, plaintiff filed suits in both state and federal court and then stayed the state court action. The District Court held that the federal case was both untimely (facial claim) and unripe (as applied claim). On appeal, plaintiff asked the court to abstain from considering its own case, pending resolution of the state court litigation, a request that the 9th Circuit granted as to the facial claim, but agreed with the District Court that the as applied claim was

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[15] *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

[16] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

unripe. Second, the plaintiff purported to file a "reservation of federal issues," notwithstanding that the 9th Circuit (unlike the 11th Circuit) had no established policy regarding such reservations. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998], applying issue preclusion notwithstanding that the state court honored the property owner's reservation of federal issues.) Third, when the state suit was decided, the California Supreme Court acknowledged that a reservation had been filed, but nonetheless analyzed decisions of this Court in ruling on the merits. Fourth, when it sought certiorari here, the plaintiff did not challenge *Williamson County*. Finally, when this Court decided *San Remo*, it was on the assumption that *Williamson County* was still good law because it had not been challenged.

This Court was thus able to review the result in *San Remo* as though *Williamson County* was etched in stone. In that light, *San Remo* simply examined the question whether application of *unchallenged* law by a state court was entitled to full faith and credit. The Court found the answer to that question obvious.

In the context of *Williamson County*, however, that obvious result only added to the confusion. While *San Remo* held that the result of a regulatory taking case tried in state

court would be entitled to full faith and credit in federal court, it left unanswered the question whether the litigation *had* to be filed in state court to begin with. *Williamson County* said that it did, but four Justices voiced grave concern about that conclusion in *San Remo*, and the Court held that it did not in *City of Chicago*.

The upshot is that the law is in hopeless disarray, heavily criticized by the scholarly community and lower courts as well. (E.g., *Dodd v. Hood River County*, 59 F.3d 852, 861 [9th Cir. 1995] ["**draconian**"]; *Fields*, 953 F.2d at 1307, n.8 ["**odd**"]; Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Report 17 at 27 [1997] ["**shocking**"]; Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 [1992] ["**Kafkaesque**"]. A collection of dozens of other such critical descriptions of *Williamson County* may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671, 702-703 [2004].)

As the confusion is the result of the adoption and interaction of this Court's own decisions, any resolution must come from this Court. (E.g., *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir. 2003] [calling the dissonance between *Williamson County* and *City of Chicago* an "anomalous gap in Supreme Court jurisprudence" whose resolution "is for the Supreme Court to say, not us."].)

The decision in *San Remo* only added to the confusion containing, as it did, the strong analysis of four Justices that *Williamson County* was erroneously decided and ripe for overruling, but failing to reach the issue because the parties did not raise it.

It is time to end the confusion.

II.

THE 11TH CIRCUIT'S "SETTLED RULE" OF REMANDING TAKINGS CASES TO STATE COURT FOR *WILLIAMSON COUNTY* "RIPENING" MANDATES ALLOWING THIS CASE TO PROCEED.

Agripost was directly ordered by the District Court and the 11th Circuit — following the "settled rule" of the 11th Circuit — to depart from the federal courts and litigate ***first*** in the

state courts. Pursuant to that settled 11th Circuit rule, Agripost was told that it could "reserve" its federal issues for federal court litigation.

The 11th Circuit's *Fields* rule was the effort of a lower court to find a way to reconcile this Court's *Williamson County* rule with the settled jurisdiction of federal courts to decide federal questions presented to them.

Williamson County was clear that after state court ripening, federal litigation could proceed. (E.g., 473 U.S. at 185 [federal claim is "premature"]; 473 U.S. at 186 [federal claim "is not ripe"]; 473 U.S. at 194 ["not yet ripe"]; 473 U.S. at 197 ["until [plaintiff] has used that [state] procedure, its taking claim is premature"].) The 11th Circuit thus created a procedure in its *Fields* decision to implement both the perceived intent and the plain language of *Williamson County*, and it adhered to that procedure consistently.

This case thus differs from *San Remo* in significant ways.

First. Unlike the 11th Circuit, the 9th Circuit had no established rule dealing with *Williamson County*.

Thus, Agripost was trapped by the settled law of the 11th Circuit into litigating in the state courts, with the promise of eventual federal court litigation thereafter. The San Remo Hotel, by contrast, was litigating in the 9th Circuit, where the Court of Appeals had already said that it would apply issue preclusion to takings cases that had obtained a state court decision. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998].) When this Court applied issue preclusion in *San Remo*, it was only doing what the 9th Circuit would have done in any event. That differs sharply from Agripost's treatment in the 11th Circuit. Recall that, as noted in the opinion below, the *Fields* rule had "become the settled law in this circuit." (App. p. 10.)

Second. There was no order there from a U.S. Circuit Court of Appeals — as there is here — refusing to allow a federal suit to proceed *until after* the property owner sued first in state court *and* reserved the right to litigate any federal issues in federal court.

Third. Agripost has filed this Petition directly challenging the continuing validity of *Williamson County*.

Because of the 11th Circuit's settled application of the *Fields* rule, this case should

not be bound by *San Remo*. This case was initially brought in federal court, and there it should have stayed. Applying *Fields*, however, the 11th Circuit directly ordered Agripost to take its case to state court. Although Agripost told the state courts it was reserving its federal issues, and those courts acknowledged as much, the 11th Circuit later held that issue preclusion attached. Thus, unlike all other plaintiffs claiming sundry violations of their *federal* constitutional rights, Agripost finds itself unable to seek relief for the violation of its federal rights in *any* court.

This much is clear: But for the 11th Circuit's order, *there would have been no state court decision* that could have functioned in an issue preclusive manner. If the 11th Circuit, in the absence of *Fields*, had determined that the matter was not ripe, Agripost could have sought review here. As it was, the law of the Circuit was settled, and it promised access to federal court. Delayed, but not denied. There was no need to question that process, so Agripost did as it was ordered to do.

Agripost is a litigational victim of a system deliberately constructed by the 11th Circuit to deal with applications of this Court's *Williamson County* decision. These things seem clear: (1) *Williamson County* needs to be

reviewed and (as to its state court litigation prong) disapproved; (2) because Agripost was following the direct orders of the 11th Circuit in submitting to state court jurisdiction — but without submitting its federal claims there — it should not suffer the loss of the federal forum it legitimately chose to litigate its federal claim.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court, as it has been applied during more than two decades, has been a nightmare. It has caused needless anguish to property owners like Agripost. It has caused wastefully repetitive litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.

Citizens, lawyers, and — particularly — busy trial judges are concerned with the law's application, i.e., its nuts and bolts. They lack the luxury of being able casuistically to parse words and theories and attempting to fit unfamiliar concepts like *Williamson County*'s state court ripeness rule into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they dare to file in federal court, but subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Finally, they are subject to loss of access to federal courts altogether under *San Remo* if they follow the letter of *Williamson County* and seek (or, as in this case, are ordered to seek) to ripen their federal claims in state court before coming to federal court. Rights created and protected by the Constitution deserve better.

Williamson County's state court litigation requirement needs to be overruled. It has become a jurisprudential poison pill, precluding determination of federal constitutional issues, rather than enabling meaningful decision.

Because of the established 11th Circuit procedure with which Agripost complied, any overruling of *Williamson County* in this case ought to apply to Agripost. Agripost was trapped by a pair of interlocking cases created by this Court and the 11th Circuit — *Williamson County* and *Fields* — which combined to force its litigation into the Florida

courts. None of that ever should have taken place. If the *Williamson County* rule requiring state court litigation is undone here, Agripost ought to be one of its beneficiaries.

Petitioner prays that certiorari be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16499

D.C. Docket No. 04-21743-CV-JEM

AGRIPOST, LLC a Florida Limited Liability Company, (successor by merger to Agripost, Inc.), AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs-Appellants,

versus

MIAMI-DADE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 22, 2008)

Before TJOFLAT, HULL and BOWMAN,* Circuit Judges.

TJOFLAT, Circuit Judge:

I.

The facts giving rise to this case are more fully documented in this court's prior opinion from the last round of this litigation, and we will not recount them all here. *See generally Agripost v. Miami-Dade County,* 195 F.3d 1225 (11th Cir. 1999). For present purposes, it suffices to sketch the basics of the controversy. Agripost LLC and Agri-Dade, Ltd. are successors in interest to Agripost, Inc. (collectively "Agripost"), which had subleased a plot of publicly owned land from Dade County, Florida ("the County") in 1986 for the purposes of constructing and operating a waste-disposal plant that could convert waste into agriculturally useful compost. One of the conditions of the sublease was that Agripost obtain and maintain an unusual use zoning permit because the land was zoned only for agricultural use. The sublease was also conditioned on Agripost's continuing use of the land for the described waste-conversion plant.[1] Agripost made a proposal to the Dade County

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* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] The lease provides in relevant part: "[T]he lease agreement shall be terminated at the option of the Lessor when and if the said premises including land and improvements shall cease

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zoning authority, received a conditional unusual use permit, constructed the plant, and began operating it in 1989. One of the conditions of the unusual use permit is that Agripost "compl[ies] with all conditions and requirements of the Department of Environmental Resources Management."

Within a year, however, the plant began having problems with odor emissions. After a hearing the County's Department of Environmental Resource Management revoked the unusual use permit because it deemed the plant's continued operation a public nuisance. This decision was upheld by the Zoning Appeals Board and then the County Commission. Without the unusual use permit, Agripost's lease on the land was terminated on its own terms.

Agripost challenged the County's decision to revoke the permit before a panel of the Dade County Circuit Court that handles administrative appeals. The panel affirmed the agency's decision after concluding that Agripost violated the terms of the conditional permit when it failed to reduce the noxious fumes generated by the plant's operation. Agripost sought but was denied review of the case by the Florida Third District Court of Appeal.

After this first go-around in state court, Agripost brought suit against the County in the United States

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to be used for a resource recovery facility. The Lessee shall upon termination surrender the premises."

District Court for the Southern District of Florida, alleging that the revocation of the unusual use permit amounted to a regulatory taking without just compensation as required by the Fifth Amendment's Takings Clause.[2] The district court dismissed the complaint for lack of ripeness under the doctrine of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). In *Williamson County,* the Supreme Court held that a federal constitutional takings claim is not ripe until the plaintiff has unsuccessfully pursued a compensation claim in state court. *Id.* at 195, 105 S. Ct. at 3121. We affirmed the dismissal on ripeness grounds. *See Agripost,* 195 F.3d at 1233-34.

Agripost then sued the County in the Dade County Circuit Court, seeking damages based on, among other state law claims, inverse condemnation, alleging that the permit revocation deprived it of all economically viable use of the property. The complaint also sought damages under the Fifth Amendment's Takings Clause but expressly reserved the right to litigate this federal claim in federal court at the conclusion of the circuit court proceedings, as this court, in *Fields v. Sarasota Manatee Airport Authority,* 953 F.2d 1299 (11th Cir. 1992), held that litigants

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[2] The Fifth Amendment's Takings Clause is applicable to the states under the Fourteenth Amendment's Due Process Clause. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001).

in Agripost's position could do. The circuit court granted the County's motion for summary judgment on all counts of the complaint, and the Third District Court of Appeal affirmed. On the inverse condemnation claim, that court held that because Agripost's property interest in the particular use, i.e., as a waste disposal facility, was conditional, Agripost did not have a property interest protected by either the state or federal constitutions against a revocation of the use permit once the County determined that Agripost was in violation of the permit's conditions. The Florida Supreme Court denied certiorari review.

Agripost thereafter returned to the federal district court, re-filing its Fifth Amendment regulatory takings claim. Agripost alleged that by revoking the conditional use permit and causing the plant to cease operations, the County deprived it of all economically beneficial use of the property without compensation. This time, the district court granted the County's motion for summary judgment on the grounds that the federal takings claim was barred by res judicata or claim preclusion as a result of the disposition in Agripost's state court suit. The court also held that Agripost's claim is barred by collateral estoppel or issue preclusion. This appeal followed.

II.

A.

We review the district court's summary judgment order *de novo,* applying the same standard as the

district court, viewing all evidence in the light most favorable to the nonmoving party, in this case Agripost. *See Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 646-47 (11th Cir. 2007).

Claim and issue preclusion are familiar legal doctrines, though they generate more than their fair share of complexity in application. One area in which they have been particularly troublesome is in takings cases brought in federal court after *Williamson County*. *Williamson County* boils down to the rule that state courts always have a first shot at adjudicating a takings dispute because a federal constitutional claim is not ripe until the state has denied the would-be plaintiff's compensation for a putative taking, including by unfavorable judgment in a state court proceeding. Once that occurs, and the plaintiff repairs to the federal district for compensation under the Fifth Amendment's Takings Clause, the plaintiff faces the possibility that the legal or factual issues resolved by the state court might have preclusive effect under the Full Faith and Credit statute, 28 U.S.C. § 1738.[3] In short, the interaction of § 1738 and

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[3] The statute reads in relevant part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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Williamson County might deprive the plaintiff of the chance to litigate his Takings Clause claim in a federal forum, unless there were some exception to the general principles of preclusion encapsulated in § 1738.

In *Fields,* we held that a plaintiff who involuntarily litigates in state court because of the rule of *Williamson County* can make an express reservation of his Takings Clause claim as an exception to the state law claim preclusion principles that would apply under § 1738. *See Fields,* 953 F.2d at 1306. That decision was based in large part on the opinion of our predecessor court in *Jennings v. Caddo Parish School Board,* 531 F.2d 1331 (5th Cir. 1976) (per curiam) (stating in dicta that plaintiff could have made an express reservation of her federal constitutional claim in state court in order to avoid claim and issue preclusion).[4] The *Fields* panel recognized the

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28 U.S.C. § 1738. Thus, federal courts apply the preclusion law of the state whose courts rendered the first decision, *see Cmty. Bank v. Torcise,* 162 F.3d 1084, 1086 n.5 (11th Cir. 1998), which in this case is the law of Florida.

[4] This court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). In *Jennings,* a former public school teacher unsuccessfully sued the school board in state court alleging that her termination was racially discriminatory and therefore denied her equal protection of the laws in violation of the Fourteenth Amendment. The district court held that because the plaintiff alleged in the state case that the firing was racially motivated and the state court rejected her claim on the merits,

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tension between permitting claim-splitting in the takings context, as authorized by *Jennings,* and the well-established rule of *Allen v. McCurry,* 449 U.S. 90, 101, 103-04, 101 S. Ct. 411, 419, 66 L. Ed. 2d 308 (1980), interpreting § 1738 to give prior state court adjudications of federal constitutional issues preclusive effect in federal courts. *See Fields,* 953 F.2d at 1303-04. Under the Court's interpretation of § 1738, state claim preclusion law that disallows separating and reserving the Takings Clause claim from the litigation of state law claims would be given full effect in federal court and would seem to rule out the kind of reservation discussed in *Jennings.*

Nonetheless, the *Fields* panel held that *Allen* did not implicitly overrule *Jennings* and did not prevent plaintiffs from reserving their Takings Clause claims. The panel analogized Fields's situation to that of a plaintiff forced into state court when a federal court invokes the *Pullman* abstention doctrine, *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 498-502, 61 S. Ct. 643, 644-46, 85 L. Ed. 971 (1941), and abstains from deciding the case. In *Pullman* abstention cases, i.e., cases in which the federal courts have subject

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res judicata barred her relitigation of the equal protection claim in federal court. *Jennings v. Caddo Parish Sch. Bd.,* 531 F.2d 1331, 1331-32 (5th Cir. 1976). The panel on appeal held that the plaintiff could have but failed to make an express reservation of her federal claim on the record in the state court proceeding, as provided by *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 421-22, 84 S. Ct. 461, 468, 11 L. Ed. 2d 440 (1964), and therefore affirmed. *Jennings,* 531 F.2d at 1332.

matter jurisdiction but relinquish it to enable the state courts to resolve antecedent state law issues that could moot the need for further proceedings in the federal case, the Supreme Court has held that the state court plaintiff may expressly reserve her federal claims so that the state court does not reach beyond the state law issues. *England v. La. State Bd. of Med. Exam'rs,* 375 U.S. 411, 421-22, 84 S. Ct. 461, 468, 11 L. Ed. 2d 440 (1964). To be sure, the plaintiff in a *Pullman* abstention case already has a ripe federal claim whereas the plaintiff in a takings case, per *Williamson County,* does not. Although *Jennings* expanded the scope of the reservation beyond the boundaries originally drawn in *England, see Fields,* 953 F.2d at 1305, the *Fields* panel harmonized *Jennings*'s broad application with the Supreme Court's interpretation of § 1738. *See Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 85 n.7, 104 S. Ct. 892, 898 n.7, 79 L. Ed. 2d 56 (1984); *Fields,* 953 F.2d at 1305-06 & nn.5-7.

Much of the basis for reaffirming *Jennings*'s continued validity relies on dicta in footnote seven of *Migra. Migra* addressed the claim-preclusive effects of a prior state court adjudication in which the federal plaintiff had also been the state court plaintiff. *Migra,* 465 U.S. at 77, 104 S. Ct. at 894. The alignment of the parties is similar to the alignment in *Fields,* and unlike *Allen,* both *Migra* and *Fields* addressed claim preclusion and not issue preclusion. Footnote seven in the Court's opinion strongly suggests that the voluntariness of the plaintiff's presence

in state court determines whether the plaintiff can reserve a federal claim for federal court later.[5] *See id.* at 85 n.7, 104 S. Ct. at 898 n.7 ("In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains . . . the plaintiff can preserve his right to a federal forum for his federal claims. . . ."). Thus, the *Fields* panel reasoned that permitting the reservation of a federal takings claim when the plaintiff litigates in state court due to *Williamson County* is sufficiently consistent with the post-*Migra* interpretation of § 1738 because the plaintiff is in state court involuntarily. *Fields*'s gloss on the *Jennings* reservation has since become the settled law in this circuit. *See, e.g., Bauknight v. Monroe County,* 446 F.3d 1327, 1330-31 (11th Cir. 2006); *Saboff v. St. John's River Water Mgmt. Dist.,* 200 F.3d 1356, 1360 (11th Cir. 2000).

The County argues that a recent Supreme Court decision, *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), rejects the availability of an *England/Jennings* reservation of federal takings claims in situations like the present case. The litigation culminating in *San Remo Hotel* resembles this

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[5] Of course, this voluntariness matters only when the litigant is the plaintiff in both forums. A state court criminal defendant is clearly not voluntarily in state court, yet the state court's decisions on federal constitutional issues are preclusive in federal court. *See Allen v. McCurry,* 449 U.S. 90, 101, 103-04, 101 S. Ct. 411, 419, 66 L. Ed. 2d 308 (1980).

case not only in the legal issues raised but also in the tangled procedural history spanning state and federal courts. *San Remo Hotel* began in California state court when the plaintiff property owner sought review of the imposition of a "conversion fee" by the City and County as a condition of permitting the plaintiff's proposed transformation of a low-rent residential building into a tourist hotel. *See id.* at 329, 125 S. Ct. at 2496. While the petition was pending, the plaintiff sued the City and County in federal district court alleging, among other claims, that the conversion fee violated the Takings Clause. The district court, following *Williamson County,* granted the defendants summary judgment as to the takings claim on the ground of ripeness. *Id.* at 330, 125 S. Ct. at 2497. The plaintiffs subsequently sued in state court raising only state law claims and reserving their Takings Clause claim by reference to *England. See id.* at 331 & n.6, 125 S. Ct. at 2497 & n.6. Throughout the course of the state court case, which went all the way to the California Supreme Court, the parties litigated and the courts decided the substance of federal constitutional issues in the form of the state law takings claim. Specifically, the constitutional issue was which standard governs the question of whether the government's conversion fee was a valid assessment in exchange for a building permit. *See id.* at 333, 125 S. Ct. at 2498-99. The California Supreme Court held that the lower standard applied and that the government's assessment was reasonable and therefore not a compensable taking. *Id.*

The plaintiff then re-filed its Takings Clause claim in the federal district court. The district court held, and the Ninth Circuit affirmed, that California issue preclusion law applies and that issues raised by plaintiff's federal constitutional claim were precluded because the California courts "had interpreted the relevant substantive state takings law coextensively with federal law." *Id.* at 335, 125 S. Ct. at 2500. The Supreme Court affirmed, holding that there is no exception to the application of issue preclusion as required by § 1738 and *Allen* for cases in which the plaintiff is forced to pursue compensation through litigating first in state court. *Id.* at 338, 125 S. Ct. at 2501-02. Moreover, the Court emphasized that *England* reservations are limited to cases in which there was proper federal jurisdiction prior to the invocation of *Pullman* abstention, in other words, when the "antecedent state issue requiring abstention was *distinct* from the reserved federal issue." *Id.* at 339, 125 S. Ct. at 2502.

Although the Supreme Court's reasoning in *San Remo Hotel* seems to undercut much of the support for *Jennings* and *Fields,* we need not decide now whether they have been implicitly overruled to the extent that they would permit the reservation of federal claims in non-*Pullman* situations. *See, e.g., Atlantic Sounding Co., Inc. v. Townsend,* 496 F.3d 1282, 1284 (11th Cir. 2007) ("[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision."). *San Remo Hotel* was

not a *claim* preclusion case; it was an *issue* preclusion case, and because we need not extrapolate from the holding in *San Remo Hotel* to decide this appeal, we will not do so. Accepting *arguendo* that Agripost has successfully reserved its federal constitutional claim, we now consider whether it is nonetheless barred by issue preclusion from going forward with that claim.

B.

Florida issue preclusion doctrine forecloses relitigation if: (1) the parties are identical with those from the prior case, (2) the issues are identical, (3) there was a full and fair opportunity to litigate the issues and they were actually litigated, and (4) those issues were necessary to the prior adjudication. *See Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006). Here, the parties are the same, the issues forming Agripost's state takings claim are the same as those involved in Agripost's federal takings claim, *see, e.g., Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1380 (Fla. 1981),[6]

[6] Agripost argues that the Dade County Circuit Court's resolution of the same state and federal constitutional issue in this case, namely whether a conditional and revocable use permit can be revoked without effecting a taking, indicates that Florida takings law has taken a "novel approach" and diverged from federal takings law. However, the court consciously applied what it thought to be both the federal and state law on the issue. Moreover, in its state court appellate brief, Agripost argued that state takings law "is governed by *Lucas*[*v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d

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and the resolution of these issues was necessary for the state court's decision in favor of the County.

Agripost contends that it did not have a full and fair opportunity to litigate its state law takings claim because the court did not permit further discovery and relied exclusively on the extensive record created in the previous zoning litigation that ended in the revocation of Agripost's permit. This argument never leaves the hangar because the state court concluded, as a matter of law, that Agripost no longer had a protected property right in their nonconforming use given the administrative determination – upheld on judicial review – that Agripost had failed to comply with the terms of its conditional use permit.[7] *See*

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798 (1992)]," acknowledging that the state and federal law on the relevant takings issues are coextensive. The Third District Court of Appeal held that the federal and state law on this issue were the same. *See Agripost, Inc. v. Metropolitan Miami-Dade County,* 845 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 2003); *cf. Trafalgar Corp. v. Miami County Bd. of Comm'rs,* No. 06-3578, 2008 U.S. App. LEXIS 4475, at *6-7 (6th Cir. Mar. 3, 2008). Agripost's real gripe here is that the state court erred, but that of course is not a defense to collateral estoppel.

[7] Agripost contends that this conclusion is an impermissible application of collateral estoppel from the zoning litigation. It is not so. The zoning and state takings litigation addressed distinct issues: the former concerned whether the revocation was justified, *see Agripost v. Miami-Dade County,* 195 F.3d 1225, 1232-33 (11th Cir. 1999) (describing earlier zoning litigation), and the latter concerned whether given a justified revocation there was nonetheless a compensable taking of private property. *See Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.,* 878 F.2d 1360, 1370-72 (11th Cir. 1989) (explaining the difference between the two concepts in Florida law). The Dade County

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Agripost, Inc. v. Metro. Miami-Dade County, 845 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 2003). Agripost argued to the state court that it still had a property right, even though it did not own the land in question and violated of the conditions of its lease when it lost the use permit, and the state courts rejected the argument. Nothing in that litigation rendered Agripost's opportunity to make its case insufficiently "full and fair";[8] Agripost is simply not entitled to discovery on claims lacking any legal basis, as the state court concluded. Florida preclusion law does not allow Agripost a second bite at the apple, and § 1738 does

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Circuit Court expressly rejected the County's argument that the zoning litigation had preclusive effect: "Now, while the prior litigation dealt with the propriety of the revocation, it didn't deal with the question of whether it constituted a taking." The court made a *de novo* ruling on the merits, concluding that because Agripost was *determined to have* violated the conditions of its unusual use permit – a fact that is undisputed – Agripost no longer had a valid, compensable property interest in that use, whether or not the violations amounted to a nuisance under other principles of Florida property law. *See Agripost v. Metro. Miami-Dade County,* 845 So. 2d at 920 (Fla. 3d Dist. Ct. App. 2003) (citing *Smalleylogics Corp. v. Dade County,* 176 So. 2d 574, 578 (Fla. 3d Dist. Ct. App. 1965)).

[8] Under Florida law, a full and fair opportunity to litigate an issue does not entail a full civil trial and its accouterments. *See E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery,* 971 So. 2d 897, 898 (Fla. 3d Dist. Ct. App. 2007) (per curiam) (noting that collateral estoppel applies to judgment rendered as a sanction in prior litigation); *Paresky v. Miami-Dade County Bd. of County Comm'rs,* 893 So. 2d 664, 665 (Fla. 3d Dist. Ct. App. 2005) (per curiam) (finding full and fair opportunity in "quasi-judicial hearing" before County Commission).

not permit this court to second-guess the correctness of the Florida court's decision on the merits.[9] Because a state court of competent jurisdiction held that Agripost did not have a compensable property interest, its federal takings claim necessarily fails, and summary judgment for the County was proper.

III.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

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[9] In any event, it is sufficiently clear under Florida law that Agripost's use of the publicly owned land was "not part of [its] title to begin with," *Lucas,* 505 U.S. at 1027, 112 S. Ct. at 2899, because it did not own the land and because its use was deemed noxious. *See Marine One, Inc. v. Manatee County,* 898 F.2d 1490, 1492 (11th Cir. 1990) (stating that "it is clear from . . . Florida cases that revocation" of a use permit on publicly owned land "would not constitute a taking of property"); *Osceola County v. Best Diversified, Inc.,* 936 So. 2d 55, 59 (Fla. 5th Dist. Ct. App. 2006) ("The threshold issue on appeal is whether [plaintiff] was entitled to compensation from the County . . . when his request for a conditional use and permit were denied based on [a] determination [that] the facility was the cause of noxious odors and constituted a public nuisance. The answer is clearly no." (citing *Lucas*)).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
04-21743-CIV-MARTINEZ-BANDSTRA

AGRIPOST, LLC, *et al.*,

Plaintiff,

vs.

MIAMI-DADE COUNTY,

Defendant. /

FINAL JUDGMENT

(Filed Oct. 21, 2005)

Pursuant to Fed. R. Civ. P. 56 and 58, and in accordance with the reasons stated in the Court's Order Granting Summary Judgment on **October 20, 2005**, judgment is entered in favor of the Defendant Miami-Dade County and against Plaintiffs Agripost, LLC and Agri-Dade, Ltd. This case is **CLOSED** and all pending motions are denied as **MOOT**.

DONE AND ORDERED in Open Court at Miami, Florida, this 21 day of October, 2005.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES
DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
04-21743-CIV-MARTINEZ-BANDSTRA

AGRIPOST, LLC, *et al.*,

Plaintiffs,

vs.

MIAMI-DADE COUNTY,

Defendant. /

ORDER GRANTING DEFENDANT MIAMI-DADE COUNTY'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Oct. 20, 2005)

THIS CAUSE came before the Court upon Defendant Miami-Dade County's Motion to Dismiss with Prejudice or for Final Summary Judgment **(D.E. Nos. 21-1, 21-2)**, filed on October 8, 2004. This motion is fully briefed and ripe for adjudication. For the reasons set forth below, Defendant's Motion for Summary Judgment is granted and Defendant's Motion to Dismiss with prejudice is denied as moot.

I. Relevant Factual and Procedural Background

Plaintiffs allege that they entered into a contract with the County to build a solid waste composting

plant; however, soon after the plant opened, Plaintiffs zoning permit was revoked. Plaintiffs have stated that as they lacked a zoning permit, "the plant had to remain closed, the lease terminated, and the plant became the property of the State of Florida." (D.E. No. 1 at 15). Plaintiffs therefore argue they were "deprived of 'all economically beneficial or productive use of' its property, without compensation." *Id.* Plaintiffs asserted one claim in their Complaint, a violation of 42 U.S.C. § 1983 for a taking under the Fifth Amendment. *Id.* A similar case was previously filed in this Court. The Court dismissed the federal takings claim, relying on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194-97 (1985) and finding that the claim did "not become ripe until a plaintiff . . . [used] available state law procedures to obtain just compensation." (D.E. No. 25, Vol. II, Order at 365). Plaintiffs then filed suit in the Florida state court for Dade County alleging a federal takings claim but noting that they were pursuing these claims in state court "involuntarily" and reserving the right to pursue these claims in "a federal forum if necessary." (D.E. No. 25, Vol. I, Compl. at 35-36).[1] The Eleventh Circuit Court for Dade County entered summary judgment on Plaintiffs' claims including their federal takings claim, finding that "as a matter of law," . . . Plaintiffs . . . [were] not entitled to inverse condemnation

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[1] This Court has taken judicial notice of several other court proceedings involving these parties. (D.E. No. 44).

damages for the revocation of a conditional revocable zoning approval as a result of their own violation of conditions." (D.E. No. 25, Vol. VI, Order Granting Defendant's Motion for Final Summary Judgment at 9, 15). The Florida Third District Court of Appeal affirmed, *see Agripost, Inc. v. Metropolitan Miami-Dade County*, 845 So. 2d 918 (Fla. 3d DCA 2003), and the Florida Supreme Court denied review. Defendants have filed a Motion to Dismiss with Prejudice or for Final Summary Judgment. This Court will address only Defendants' Motion for Summary Judgment.

II. Legal Standard

Under Federal Rule of Civil Procedure 56(c), a Motion for Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court further explained the movant's burden in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as follows:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

> and on which that party will bear the burden of proof at trial.

Id. at 322. The Court further stated that "Rule 56(e) . requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. By its very terms, this standard provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

III. Analysis

Defendant raises several arguments in their motion; however, this Court finds it is only necessary

to address Defendant's res judicata argument, which this Court finds has merit.[2] Under Florida law,[3]

> [f]or res judicata to apply, four elements must be established: "1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of persons and parties of the action; and 4) identity of the quality of persons and parties of the action."

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[2] The Court does note that to the extent Defendants are challenging the propriety of the state court order, such a challenge violates the Rooker-Feldman doctrine, which limits "the subject matter jurisdiction of federal district courts and courts of appeal over certain matters related to previous state court litigation." *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001). The Eleventh Circuit Court of Appeals has defined this doctrine stating:

> Rooker-Feldman bars lower federal court jurisdiction where four criteria are met: (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment.

Amos v. Glynn County Board of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir.2003) (internal citations omitted).

[3] [W]hen a federal court exercises federal question jurisdiction and is asked to give *res judicata* effect to a state court judgment, it must apply the '*res judicata* principles of the law of the state whose decision is set up as a bar to further litigation.'" *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1985) (quoting *Hernandez v. City of Lafayette*, 699 F.2d 734, 736 (5th Cir. 1983)).

Selim v. Pan American Airways Corp., 889 So. 2d 149, 153 (Fla. 4th DCA 2004) (quoting *Signo v. Fla. Farm Bureau Cas. Ins. Co.*, 454 So. 2d 3, 4 (Fla. 4th DCA 1984)). This Court finds that the standard has been met as to all four elements based on Plaintiff's suit in the state court.

First, the suits meet the requirement that there be an "identity of the thing sued for." In the state court suit, Plaintiffs sought money damages for the federal takings claim violation. (D.E. No. 25 Vol. I, Compl.). In this case, Plaintiffs have also sought money damages. (D.E. No. 1 at 15-16). The suits also have "identity of the cause of action." This identity "is a question of 'whether the facts or evidence necessary to maintain the suit are the same in both actions.'" *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1209 (Fla. 4th DCA 2005) (en banc) (quoting *Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984), *superseded by statute on other grounds, Bowen v. Fla. Dep't of Envtl. Regulation*, 448 So. 2d 566 (Fla. 2d DCA 1984)). Here, Plaintiffs are asserting the identical federal takings claim; therefore, the facts and evidence necessary to maintain this suit are the same in both actions. The third element which requires an identity of the persons or parties in both suits is also met as both suits involve the same parties. *See* (D.E. No. 1); (D.E. No. 25, Vol. I, Compl.). Finally, the fourth element, requiring an identity of the quality of persons and parties is also met because as already stated both actions involved the same parties.

Plaintiffs argue that their specific reservation of federal jurisdiction in regard to their federal takings claim in their state suit prevents the state suit from having preclusive effect in this case. However, a recent United States Supreme Court case forecloses this argument. In *San Remo Hotel v. City and County of San Francisco, CA,* 125 S. Ct. 2491 (2005), hotel owners challenged the constitutionality of a hotel conversion ordinance, arguing that the ordinance was a taking in violation of the Fifth Amendment. The federal district court granted summary judgment and required the plaintiffs to first seek compensation in state court. *Id.* at 2497. The Ninth Circuit Court of Appeals affirmed this decision. *Id.* In the state court suit, plaintiffs reserved the right to return to federal court and adjudicate their federal takings claim. *Id.* However, despite the reservation, the state court decided the takings claim under both California law and federal law. *Id.* at 2498. Plaintiffs then returned to federal district court and the district court held that plaintiff's claim was barred by "issue preclusion." *Id.* at 2499. "The District Court reasoned that 28 U.S.C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered." *Id.* at 2499-2500. The court found that because the California court "interpreted the relevant substantive takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court. *Id.* at 2500. The Ninth Circuit Court of Appeals affirmed. *Id.* The

United States Supreme Court also affirmed finding that "[a]lthough petitioners were certainly entitled to reserve some of their federal claims . . . their . . . expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation" was erroneous. *Id.* at 2501-02. The Court noted that there was no ultimate federal right to litigate federal claims in a federal court. *Id.* at 2504. The Court then held federal takings claims actually litigated in state court are not exempt from the full faith and credit statute, 28 U.S.C. § 1738, which encompasses the doctrines of res judicata and collateral estoppel. *Id.* at 2500, 2505-07.

Thus, any argument that Plaintiff's reservation of this issue for the federal court precludes the application of res judicata to this action is without merit. Here, it is clear that the federal takings claim was actually litigated in this case as the Court entered a specific order on this count. *See* (D.E. No. 25, Vol. VI, Order Granting Defendant's Motion for Final Summary Judgment). Therefore, as all of the elements of res judicata[4] have been met. It is hereby:

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[4] Defendants have also argued that this case is precluded by the doctrine of collateral estoppel. Under Florida law,

> [c]ollateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter

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ORDERED AND ADJUDGED that

1. Defendant Miami-Dade County's Motion for Summary Judgment **(D.E. Nos. 21-2)** is **GRANTED**. This case is **CLOSED** and all pending motions are **DENIED AS MOOT.**

2. Defendant Miami-Dade County's Motion to Dismiss with Prejudice **(D.E. No. 21-2)** is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of October, 2005.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES
DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record

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be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. The courts have emphasized that collateral estoppel precludes relitigation of issues actually litigated in a prior proceeding.

Dep't of Health & Rehab, Servs. v. B.J.M., 656 So.2d 906, 910 (Fla. 1995) (citing *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977)). The court finds it unnecessary to discuss this issue in detail as the doctrine of res judicata bars this suit, however, this Court also finds that the elements of collateral estoppel have been met. Thus, this suit would also be barred by collateral estoppel.

APPENDIX C

United States Court of Appeals,
Eleventh Circuit.

AGRIPOST, INC., a Florida Corporation,
Agri-Dade Ltd., a Florida Limited Partnership,
Plaintiffs-Appellees,

v.

MIAMI-DADE COUNTY, through its Manager
and Board of County Commissioners,
Defendant-Appellant.

No. 97-5654.

Nov. 15, 1999.

Robert L. Krawcheck and James J. Allen, Asst. County Attys., Chesterfield Smith, Holland & Knight, Miami, FL, for Defendant-Appellant.

Joseph Wayne Beasley, Kelly, Black, Black, Byrne & Beasley, PA, Miami, FL, Sheldon H. Elsen, Orans, Elsen & Lupert, New York City, NY, for Plaintiffs-Appellees.

Charles McCoy, Asst. Atty. Gen., Tallahassee, FL, Amicus Curiae brief on behalf of Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONDSON, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In 1987, the Board of Commissioners of Dade County, Florida, granted Agripost, Inc. an unusual use zoning permit for the construction and operation of a waste disposal facility. In 1991, the Dade County Zoning Appeals Board revoked the permit. After an appellate panel of the Dade County Circuit Court affirmed the revocation, and the Florida District Court of Appeal declined review, Agripost brought this suit against Dade County, claiming that the revocation constituted a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.[1] The district court dismissed Agripost's takings claim as unripe because Agripost had failed to pursue Florida's inverse-condemnation remedy. The County now appeals,[2] contending that the district court should have dismissed Agripost's takings claim under the *Rooker-Feldman* doctrine[3] for want of subject matter jurisdiction, or, alternatively, granted it summary judgment on the ground that principles of

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[1] Agripost's complaint contained several other claims based on the revocation of Agripost's permit. With the exception of an equal protection claim, which we address in note 12 *infra*, none of these other claims are before us or are germane to this appeal.

[2] *See infra* part II.

[3] The *Rooker-Feldman* doctrine derives from *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and reserves to the United States Supreme Court the authority to review final decisions from a state's highest court. *See also infra*, note 7.

res judicata and collateral estoppel barred the claim. We agree with the district court that Agripost's takings claim was unripe. We therefore affirm its dismissal of the suit.

I.

In 1986, Dade County's Board of Commissioners (the "Board") sought proposals for the construction and operation of a waste disposal plant that would create an environmentally safe, useful end product from the county's solid waste. Agripost submitted a proposal, which the Board subsequently accepted. Agripost then leased a site for its facility.[4] Because the site was zoned for agricultural use, Agripost needed to obtain an unusual use zoning permit from the Board before it could construct and operate the plant. Agripost therefore applied for such a permit. On March 5, 1987, the Board approved Agripost's application, but made its approval subject to several conditions. One condition required Agripost to operate its facility in accordance with the plot use plan to be devised by Agripost and approved by the County's

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[4] Agripost's plant would convert garbage to agricultural fertilizer by grinding the garbage into small particles and then applying chemicals that enhanced the natural decay of the resulting waste. The site that Agripost selected for this facility abutted Dade County's landfill and was near the County's transfer station from which waste was distributed to disposal facilities. Unfortunately, the site was located in a residential neighborhood and was adjacent to an 800-student elementary school.

Zoning Director. Another required Agripost to comply with all "conditions and requirements" of Dade County's Department of Environmental Resource Management ("DERM"),[5] which included specific requirements for the storage of waste products, and that the facility not cause a nuisance.[6]

Agripost's facility began operating in the fall of 1989, and soon thereafter, area residents began complaining that finely ground waste particles were emanating from the plant and that a vile stench covered the area. According to officials from an adjacent elementary school, a "black, thick glue-like mold" was covering nearly every surface of the school, and students and teachers alike were developing various illnesses.

In October 1990, DERM informed Agripost that its facility was creating a nuisance; DERM alleged both that noxious odors were emanating from the plant, and that Agripost was storing waste products in a manner contrary to the conditions of its permit

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[5] DERM reviewed Agripost's permit application and issued a memorandum detailing a list of requirements that were in turn incorporated as conditions in the Board's resolution authorizing the unusual use zoning permit.

[6] On July 7, 1987, Agripost and Dade County signed an agreement for the construction and operation of the facility (the "Agreement"). The Agreement set out the amount of waste that the County would deliver per week to Agripost and the compensation that Agripost would receive for disposing of the waste. The Agreement also incorporated the conditions that the Board had placed on its approval of the unusual use zoning permit.

and in a location other than that prescribed by the plot use plan. The County's Building and Zoning Department ("B&Z") then initiated procedures to revoke Agripost's unusual use zoning permit; B&Z issued zoning violation notices that alleged that Agripost had breached the conditions of its permit, and requested a hearing before the Zoning Appeals Board ("ZAB") to determine whether the permit should be revoked. After a hearing on January 16, 1991, the ZAB concluded that Agripost had failed to comply with the conditions of its unusual use permit, and therefore revoked it. The Board affirmed the ZAB's decision.

Having exhausted its administrative remedies, Agripost appealed the Board's decision to a three-judge panel of the appellate division of the Dade County Circuit Court (the "Circuit Court"). After reviewing the administrative record, the court concluded that Agripost had failed to comply with the conditions of its permit; the court therefore affirmed the revocation of Agripost's permit. The Florida District Court of Appeal thereafter denied Agripost's petition for certiorari review. *See Agri-Dade, Ltd. v. Metropolitan Dade Co.*, 605 So.2d 1272 (Fla. 3d DCA 1992).

On September 29, 1994, Agripost brought the present lawsuit against Dade County in the United States District Court for the Southern District of Florida. Agripost claimed that by revoking the permit, the Board, and therefore Dade County, deprived it of all economically viable use of its leasehold

interest, of its facility, and of its rights under the Agreement. Because the County had not provided just compensation, Agripost contended, the permit revocation constituted a taking in violation of the Fifth and Fourteenth Amendments.

In response, Dade County, citing the *Rooker-Feldman* doctrine, which reserves to the United States Supreme Court the authority to review final decisions from a state's highest court, moved the district court to dismiss Agripost's takings claim for lack of subject matter jurisdiction. According to the County, the Circuit Court decided Agripost's takings claim in affirming the revocation of Agripost's permit. The County moved alternatively for summary judgment on the grounds of res judicata and collateral estoppel. It contended that (1) res judicata barred the takings claim because the claim was either litigated or should have been litigated in the Circuit Court proceeding, and (2) collateral estoppel barred the takings claim because a factual issue essential to the takings claim was resolved against Agripost in the Circuit Court.[7]

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[7] Although res judicata, collateral estoppel, and *Rooker-Feldman* are separate doctrines, they have a "close affinity" to one another. *Valenti v. Mitchell,* 962 F.2d 288, 297 (3d Cir.1992). In considering whether to give preclusive effect to state court judgments, federal courts must apply that state's law of collateral estoppel. *See Vazquez v. Metropolitan Dade County,* 968 F.2d 1101, 1106 (11th Cir.1992). Under res judicata, a final judgment "bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters

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The district court, on its own initiative and over Dade County's objection, dismissed as unripe Agripost's takings claim, because Agripost had failed to pursue the inverse-condemnation remedy that Florida provided to property owners who, like Agripost, alleged that an administrative decision rendered their property worthless. In the district court's view, the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 194-97, 105 S.Ct. 3108, 3120-22, 87 L.Ed.2d 126 (1985), required Agripost to pursue that remedy before it could make a Fifth Amendment takings claim.[8]

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germane thereto that were or could have been raised." *Hoechst Celanese Corp. v. Fry,* 693 So.2d 1003, 1006 n. 9 (Fla. 3d DCA 1997). Collateral estoppel bars identical parties from relitigating issues that were actually adjudicated in a prior proceeding. *See Florida Dep't of Revenue v. Ferguson,* 673 So.2d 920, 922 (Fla. 2d DCA 1996). Under the *Rooker-Feldman* doctrine only the United States Supreme Court has the authority to review a final state court judgment that unambiguously disposes of a federal constitutional claim. *See Dale v. Moore,* 121 F.3d 624, 626 (11th Cir.1997). The doctrine not only bars review of claims that were actually litigated in state court, but also bars those that are "inextricably intertwined" with the state court judgment. *Feldman,* 460 U.S. at 482 n. 16, 103 S.Ct. at 1315 n. 16. A federal claim is intertwined with the state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring).

[8] In *Williamson,* the Supreme Court noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson,* 473 U.S.

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In deciding that Agripost's takings claim was not ripe, the district court addressed the questions whether it should dismiss the claim for want of subject matter jurisdiction under the *Rooker-Feldman* doctrine or, instead, entertain the claim on the merits and reject it on grounds of res judicata and collateral estoppel. Citing an exception to the *Rooker-Feldman* doctrine, the court concluded without elaboration that that doctrine did not apply because Agripost "did not have a reasonable opportunity to raise [its claim for compensation] before the Circuit Court." Similarly, the district court stated that res judicata and collateral estoppel did not apply because Agripost's appeal of the permit revocation to the Circuit Court did not include a separate cause of action for inverse condemnation.[9]

Although Dade County prevailed in the district court, it is Dade County, not Agripost, that now appeals the district court's judgment. Dade County asks that we affirm the district court's dismissal of Agripost's takings claim, but that we do so on grounds that the district court rejected – namely, that the claim is barred by the *Rooker-Feldman* doctrine,

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at 194, 105 S.Ct. at 3120. Thus, the Court concluded, if the state has established a process for obtaining compensation, the property owner cannot prosecute a takings claim under the Fifth and Fourteenth Amendments unless he alleges that the state process is inadequate.

[9] In reaching this conclusion, the district court effectively denied the County's motion for summary judgment based on the affirmative defenses of res judicata and collateral estoppel.

res judicata, and collateral estoppel. We conclude that the district court correctly determined that Agripost's takings claim was unripe. We therefore affirm its dismissal of the claim.

II.

As a threshold matter, we must determine whether Dade County has standing to appeal the district court's judgment. Because the district court dismissed Agripost's suit, the County was the prevailing party below. Ordinarily, the prevailing party does not have standing to appeal because it is assumed that the judgment has caused that party no injury. *See Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980); *Ashley v. Boehringer Ingelheim Pharms.* (*In re DES Litigation*), 7 F.3d 20, 23 (2d Cir.1993). An exception to this rule exists, however, when the prevailing party is prejudiced by the collateral estoppel effect of the district court's order. In such a case, the litigant has been aggrieved by the judgment and has standing to appeal. *See Ashley,* 7 F.3d at 23.

This exception applies in the present case. Here, although the district court ultimately dismissed Agripost's takings claim, it first considered – and rejected – Dade County's res judicata and collateral estoppel defenses. Unless it is set aside, the court's ruling regarding those defenses will have a preclusive effect in pending litigation that is likely to prejudice Dade County. Following the district court's ruling

that Agripost's takings claim had not been litigated in the Circuit Court and therefore was unripe, Agripost brought a takings claim in state court.[10] Because the district court rejected the County's collateral estoppel and res judicata defenses, the County will be precluded from raising those same defenses in the state court proceeding.[11] In other words, the County would

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[10] The state court proceeding has been stayed pending the outcome of this appeal.

[11] In this case, the Florida court would look to federal claim preclusion law in determining whether to give the former federal judgment preclusive effect. *See Andujar v. National Property and Cas. Underwriters*, 659 So.2d 1214, 1216 (Fla. 4th DCA 1995) ("We agree with defendant to the extent that federal claim preclusion law governs, rather than Florida's. Whenever res judicata is asserted, the court in the second forum is bound to give the former judgment the same preclusive effect that the rendering court would give it."). A district court's ruling has a preclusive (collateral estoppel) effect on subsequent litigation only if "(1) the issue [is] identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action [is not] significantly heavier." *SEC v. Bilzerian* (*In re Bilzerian*), 153 F.3d 1278, 1281 (11th Cir.1998). The district court's resolution of Dade County's res judicata and collateral estoppel defenses satisfies these criteria. First, because the takings claim that Agripost has filed in state court is identical to the one presently before us, the question whether res judicata and collateral estoppel bar the claim is also identical. Second, these two defenses were clearly litigated in the district court. Third, the district court's ruling regarding those defenses was necessary to its judgment; the essence of the defenses is that Agripost's takings claim had already been litigated in the Circuit Court, and the resolution of that issue was necessary to the district court's ruling that the takings claim was unripe.

(Continued on following page)

be precluded from arguing that Agripost had already raised and lost its takings claim. Thus, Dade County has standing to appeal the district court's judgment.[12]

III.

Before we address the County's alternative arguments that the district court should have either (1) dismissed Agripost's takings claim for want of subject matter jurisdiction, as required by the *Rooker-Feldman* doctrine, or (2) entertained the claim on the merits and granted summary judgment on the ground that the claim was barred by principles of res judicata or collateral estoppel, we think it necessary to recall what a property owner must allege in order to state a claim that a local entity has effected a

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Fourth, the burden of persuasion in the pending state court action is no heavier than the burden that existed in the district court. Thus, unless it is set aside, the district court's ruling will preclude Dade County from relitigating those defenses.

[12] In addition to the takings claim, Agripost's complaint raised a claim under the Fourteenth Amendment's Equal Protection Clause. The district court dismissed this claim for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). Although Dade County appeals the district court's dismissal of that claim on the ground that the court instead should have dismissed it under the doctrines of res judicata, collateral estoppel, and *Rooker-Feldman,* we conclude that the County has not been aggrieved by the district court's disposition of this claim. The district court's judgment prevents Agripost from relitigating its equal protection claim in another proceeding; consequently, there is no collateral estoppel effect that could be prejudicial to the County. We therefore make no further mention of Agripost's equal protection claim.

regulatory taking of his property without just compensation in violation of the Fifth Amendment.

First, the property owner must allege that the governmental action – here, the revocation of a permit to operate a waste disposal plant – has "denie[d] all economically beneficial or productive use of" his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992). In other words, the governmental action must have made the property worthless.

Second, the property owner must allege either that the state law provides him no process for obtaining just compensation (such as an action for inverse condemnation) or that the state law appears to provide such process, but due to state court interpretation, the process is inadequate.[13] If the property owner makes either allegation, then his Fifth Amendment takings claim is ripe. If, on the other hand, he makes neither allegation (and cannot do so because the state law affords an adequate process for

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[13] An example of how a state law – adequate on its face – could provide an inadequate remedy because of a state court's (the trial court's and/or the appellate court's) interpretation would be if the state law provided an inverse condemnation action to remedy a taking, but the state court interpreted the law as capping the property owner's damages at less than the value of what was taken. In such a case, the state court's interpretation of the law would render the remedy inadequate to provide "just compensation" within the meaning of the Fifth Amendment.

obtaining just compensation), his Fifth Amendment takings claim is not ripe. If such a claim is pending in federal district court, the district court must dismiss it for lack of subject matter jurisdiction since the owner has failed to establish an Article III "case or controversy." *See Reahard v. Lee County,* 30 F.3d 1412, 1417 (11th Cir.1994) ("It follows that '[a]s a practical matter, *Williamson* precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation.'") (quoting *New Port Largo, Inc. v. Monroe County,* 985 F.2d 1488, 1496 (11th Cir.1993) (Tjoflat, C.J., specially concurring)). With the foregoing principles in mind, we turn to Dade County's argument that Agripost's Fifth Amendment takings claim was actually litigated in the Circuit Court (and decided against Agripost)[14] and, therefore, that the *Rooker-Feldman* doctrine required the district court to dismiss the claim for want of subject matter jurisdiction.

If Agripost's Fifth Amendment takings claim was actually litigated and decided against Agripost in the Circuit Court, the Circuit Court's decision must have

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[14] State courts of general jurisdiction, such as the Dade County Circuit Court, have the authority, if not a duty, to entertain the federal constitutional claims presented to them. Whether the three-judge Circuit Court that decided Agripost's appeal of the permit revocation would have had jurisdiction to consider Agripost's takings claim is problematic, as we point out in the text *infra.*

come after that court affirmed the County's revocation of Agripost's permit. That is because without the revocation of the permit, Agripost could not have claimed that the County's action denied Agripost all economically beneficial or productive use of its property. At that point, Agripost had to have filed a pleading (with the Circuit Court) alleging the following:

> The Circuit Court's decision affirming the County's revocation of the permit effectively rendered Agripost's property (its leasehold, its plant, and its rights under the Agreement) worthless; Florida law provides no adequate procedure, such as an action for inverse condemnation, for obtaining just compensation; because Florida law is deficient in this respect, Agripost has a ripe Fifth Amendment takings claim, and is entitled to just compensation.

The Circuit Court thereafter would have had to acknowledge Agripost's pleading, entertain Agripost's takings claim on the merits, and deny relief. The court would have denied relief because it found that the property had not been rendered worthless.

We conclude that the Circuit Court did not acknowledge, and therefore did not litigate, Agripost's takings claim for two reasons. First, the record is devoid of any indication that Agripost presented such a claim to the Circuit Court after the court

affirmed the Board's revocation of Agripost's permit.[15] Specifically, we find no allegation by Agripost to the effect that its property had been rendered worthless and that Florida provided no adequate process for obtaining just compensation. Nor is there any indication that the Circuit Court noticed a takings claim on its own initiative and, having done so, rejected it as legally insufficient.

Second, the Circuit Court lacked the authority to determine the takings issue. The Circuit Court's task was limited to one question: whether the Board's revocation of Agripost's permit was justified. The court was not called upon to determine whether there had been a Fifth Amendment taking. A Fifth Amendment takings claim could not have materialized until the Circuit Court passed on the propriety of the Board's revocation of Agripost's permit. *See Lake Lucerne Civic Ass'n Inc., v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370 (11th Cir.1989) ("The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.") (quoting *Albrecht v. State*, 444 So.2d 8, 12 (Fla.1984)). Only after the Circuit Court affirmed the Board's decision and the Florida District Court of Appeal denied Agripost certiorari review could Agripost have claimed that the revocation of the permit

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[15] Nor is there any indication that Agripost presented the Circuit Court with a Fifth Amendment takings claim prior to the court's decision affirming the revocation of Agripost's permit.

rendered its property worthless.[16] *See id.* In sum, the takings issue was not – nor could it have been – entertained by the Circuit Court in its appellate review of the Board's action on Agripost's permit. Consequently, the *Rooker-Feldman* doctrine did not require the district court to dismiss Agripost's takings claim.

We next turn to Dade County's claim that the district court should have granted it summary judgment on the ground that res judicata barred Agripost's claim. Res judicata bars a subsequent suit between the same parties based on the same cause of action. It applies to (1) all matters that were actually raised, and (2) all matters that could have been raised in the prior suit. *See Hoechst Celanese Corp.*, 693 So.2d at 1006 n. 9; *ICC Chem. Corp. v. Freeman*, 640 So.2d 92, 93 (Fla. 3d DCA 1994). The County claims that res judicata barred the takings claim because Agripost actually raised (and the Circuit Court actually adjudicated) that claim; alternatively, Dade County contends that res judicata applied because Agripost had an opportunity to present that claim to the Circuit Court.

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[16] The allegation that the property had become worthless could not be made until the revocation of the permit became effective; that is, when the Circuit Court affirmed the Board's decision and the Florida District Court of Appeal denied Agripost's petition for certiorari on September 21, 1992. *See Agri-Dade*, 605 So.2d at 1272.

Unfortunately for Dade County, our conclusion that the *Rooker-Feldman* doctrine is inapplicable forecloses the County's res judicata defense. First, as we have observed, the Circuit Court did not adjudicate a takings claim, because Agripost did not present one to the court. Second, Agripost did not have an opportunity to present the claim; it could not have done so until judicial review (of the Board's action) in the Circuit Court and in the Florida District Court of Appeal had run its course.

Finally, we consider Dade County's contention that the takings claim was barred by collateral estoppel. The County asserts that the district court should have granted it summary judgment on the basis of that defense because the Circuit Court, in reviewing the permit revocation, found that the Board's action had not rendered Agripost's property worthless. The necessary result of this finding, the County contends, is that Agripost's Fifth Amendment takings claim fails as a matter of law. The County's argument proceeds as follows.

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987), the Supreme Court recognized that state courts have the power to strike down zoning actions that are confiscatory, thereby subjecting the local government to liability for a temporary taking only. In Florida, a zoning ordinance that effectively confiscates property is void. *See Dade County v. National Bulk Carriers Inc.,* 450 So.2d 213, 216 (Fla.1984). According to the County,

this rule also applies in a case involving the denial of a permit; thus, if the denial is confiscatory, it is void. Therefore, in reviewing the County's action in the instant case, the Circuit Court was required to set aside the Board's action if it was confiscatory.[17] Under the County's view of the law, because the Circuit Court affirmed the Board's action, it necessarily found that the action was not confiscatory – that is, Agripost was not deprived of all productive use of its property. Given this finding, Dade County contends, collateral estoppel precluded Agripost from establishing in the district court an indispensable element of its takings claim (that the Board's action rendered its property worthless), and the court should have granted the County summary judgment.

Dade County's argument is correct in part; certain zoning actions are invalid under Florida law if they are confiscatory. What the County fails to recognize, however, is that this rule only applies to zoning ordinances, not to permit denials or revocations that constitute a proper exercise of the local government's police power. *See Key Haven Associated Enters., Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153, 159 (Fla.1982).

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[17] In reviewing the propriety of the Board's revocation of Agripost's permit, the Circuit Court was required to determine "whether the essential requirements of the law have been observed." *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982). The County contends that an essential requirement of the law was that the Board's action not be confiscatory.

In the proceeding before the Circuit Court, whether the Board's revocation of Agripost's permit effectively confiscated its property was irrelevant; the question before the court was whether the revocation was within the scope of the Board's police power. The court answered the question in favor of the County. Because the Circuit Court did not consider whether the Board's action would, if permitted to stand, effectively confiscate Agripost's property, the district court correctly held that collateral estoppel did not bar Agripost's Fifth Amendment takings claim.

IV.

At last, we turn to the question whether the district court properly dismissed Agripost's takings claim as unripe. We conclude that it did. Agripost failed to allege in the district court (as it failed to allege in the Circuit Court) either that Florida provided no process for obtaining just compensation or that the process it provided was inadequate. Agripost's Fifth Amendment claim was not ripe for review; therefore, the district court properly dismissed it for want of subject matter jurisdiction.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

AGRIPOST, INC., a Florida corporation and AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs,

v.

METROPOLITAN DADE COUNTY,

Defendant. /

CASE NO. 94-2031-CIV-DAVIS
MAGISTRATE JUDGE JOHNSON

BEFORE THE COURT is Metropolitan Dade County's Motion to Dismiss or, in the alternative, Motion for Summary Judgment (D.E. 10. After due consideration of the parties' memoranda of law and oral argument, the Court will dismiss the federal claims and decline to exercise supplemental jurisdiction over the state claims.

I. Factual Background

In July 1987, the Dade County Board of Commissioners ("Board") and Agripost, Inc. entered into a contract for construction of a demonstration facility to

convert municipal solid waste into compost.[1] Before executing the contract, Agripost worked with Dade County staff to locate a site for the facility. Complaint at ¶ 27. Agripost selected a site on the west side of Northwest 47th Avenue, adjacent to a state-owned school for individuals with disabilities, a "halfway house" detention center for women operated by the State of Florida, and an elementary school surrounded by single-family homes. *See* Zoning Hearing File at 22, 95. The State of Florida, owner of the site, was leasing it to the Florida Department of Health and Rehabilitative Services ("HRS"). Complaint at ¶ 28.

On October 28, 1986, Agripost entered into a long-term lease of the site with HRS.[2] The lease also gave Agripost an option to lease up to thirty additional acres within a defined tract adjoining the site (the "adjacent site"). The lease provided that it would become void should Agripost fail to obtain a contract to construct and operate a resource recovery facility within six months of its effective date. Complaint at ¶ 31. In addition, HRS had the option to terminate the lease if the site was not used for a resource recovery facility. Complaint at ¶ 31. Upon termination, all

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[1] The Contract was subsequently assigned to Agri-Dade. Complaint at 23.

[2] On July 8, 1988, Agri-Dade became the lessee of the site pursuant to an assignment approved by the State of Florida and HRS. Complaint at 29.

buildings on the site would pass to HRS without any compensation to Agripost. Complaint at ¶ 31.

Following execution of the lease, Dade County's Building and Zoning Department ("B&Z") advised Agripost that it would need an unusual use permit to operate the resource recovery facility on the site, which was zoned for agricultural use. Complaint at ¶ 32. B&Z also informed Agripost that it would not need a permit to store composted product in the adjacent site. Complaint at ¶ 34.

Agripost then applied for an unusual use permit to build and operate the facility on the site. Complaint at ¶ 34. The Board of County Commissioners approved the unusual use permit on March 5, 1987, in Resolution Z-63-87.[3] The approval was expressly subject to certain conditions, including:

> . . .
>
> 2. That in approval of the plan, the same be substantially in accordance with that submitted for the hearing entitled "Dade County MSW Composting Facility Agripost, Inc." . . .
>
> 3. That the use be established and maintained in accordance with the approved plan.

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[3] A group of citizens appealed Resolution Z-63-87, arguing the proposed use was incompatible with the neighborhood. *Concerned Citizens of Carol City, Inc. v. Metropolitan Dade County and Agripost, Inc.*, Circuit Court No. 87-139 AP. Complaint at 37. The state court affirmed the Board's decision.

. . .

> 8. That the applicant comply with all conditions and requirements of the Department of Environmental Resources Management.

Resolution Z-63-87. Paragraph 8 incorporated various conditions, including 1) that the compost product be covered and stored on an impermeable base, 2) that the operation of the composting facility not cause a nuisance, and 3) that no solid waste or compost products be stored outdoors where they could be exposed to rainfall. *See* Motion Appendix A at 47 (Department of Environmental Resources Management Memorandum dated February 24, 1987).

On July 7, 1987, the County and Agripost entered into a contract for construction of a demonstration facility to convert municipal solid waste into compost.[4] Complaint at ¶ 23. The contract incorporated the provisions of the unusual use permit approval. Contract at ¶ 3.01. The contract also contained a provision regarding "obnoxious odors" which stated " . . . continual generation of obnoxious odors, if not corrected within a reasonable time after written notice by the County, shall constitute a default by Agripost." Complaint at ¶ 50.

In October 1990, the Department of Environmental Resources Management ("DERM") notified

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[4] The Contract was subsequently assigned to Agri-Dade. Complaint at 23.

Plaintiffs that the facility was generating obnoxious odors and creating a nuisance. Complaint at ¶ 54. DERM then ordered Plaintiffs to submit, among other things, an odor control plan for approval. DERM approved a modified version of Plaintiffs' plan on December 10, 1990. Complaint at ¶ 57. Plaintiffs and the County then discussed a possible contract amendment that would enable Plaintiffs to implement the Odor Control Plan.[5] At a December 20, 1990 meeting, the Board voted to reject the proposed amendment. Complaint at ¶ 65.

In the meantime, Dade County's Building and Zoning Department ("B&Z") issued violation notices and applied for a hearing before the Zoning Appeals Board ("ZAB"), claiming Plaintiffs had violated Conditions No. 2, 3 and 8 of the unusual use zoning resolution. Complaint at ¶ 70. The ZAB held a revocation hearing on January 16, 1991 and voted to revoke the unusual use, finding that Plaintiffs had, in fact, violated these conditions. Complaint at ¶ 78. Plaintiffs closed the plant the following day and appealed the ZAB's decision to the Board of Commissioners. Complaint at ¶ 81. After a hearing on May 23, 1991, the Board affirmed the ZAB's decision.

On July 10, 1991, Agri-Dade appealed the Board's order to the Appellate Division of the Circuit

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[5] The proposed amendment would increase some of the "tipping fees" the County was required to pay under the original contract.

Court for the Eleventh Judicial Circuit of Florida. On June 5, 1992, the Circuit Court affirmed the Board's action *Agri-Dade, Ltd. v. Metropolitan Dade County*, Case No. 91-214-AP ("The County's decision must be affirmed because . . . Agri-Dade is found by the substantial competent evidence test not to have complied with the conditions of the resolution, therefore justifying the County's revocation").

On July 6, 1992, Agri-Dade petitioned the Florida Third District Court of Appeal for a writ of certiorari. The Third District denied the petition without comment on September 21, 1992. Plaintiffs subsequently filed for bankruptcy protection under Chapter 11 of the federal Bankruptcy Code. Complaint at ¶ 31.

On September 29, 1994, Plaintiffs filed the present action, asserting the following federal and state law claims: inverse condemnation under the Fifth Amendment to the U.S. Constitution and 42 U.S.C. § 1983 (Count I), inverse condemnation under Florida law (Count II), violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Section 1983 (Count III), 4) violations of their procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Section 1983 (Count IV), violations of Fl. Stat. § 405.7063 (Count VI), breach of contract (Count VII), and equitable estoppel (Count VIII).[6]

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[6] The Complaint originally asserted a claim for violations of substantive due process rights under the Fourteenth Amendment to the U.S. Constitution and Section 1983 (Count V).

(Continued on following page)

II. Preclusion

a. Preclusive Effects of Prior Litigation on Federal Claims

The County argues that the Florida Circuit Court's decision has a preclusive effect on Plaintiff's federal claims in this present action. This argument is premised on the *Rooker-Feldman* doctrine, as well as principles of res judicata and collateral estoppel. After considering the prior state court litigation in the context of each of these doctrines, the Court rejects the County's argument with respect to Plaintiffs' inverse condemnation and equal protection claims (Counts I & III). However, the Court concludes the *Rooker-Feldman* doctrine bars Plaintiffs' procedural due process claim (Count IV).

The *Rooker-Feldman* doctrine provides that a federal district court may not review the final decisions of a state court of competent jurisdiction. *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The rule applies "not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are 'inextricably intertwined' with the state court's judgment." *Feldman* 460 at 582 n.16. The Eleventh Circuit has recognized an exception to the rule when the plaintiff has no "reasonable opportunity to raise his

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Plaintiffs are no longer pursuing this claim. Response at 29 n.10.

federal claim in the state proceedings." *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996). Under those circumstances, the federal claim is not considered "inextricably intertwined" with the state court judgment. *Id.*

In considering Plaintiff's due process claim, the Court notes that the Appellate Division of the Circuit Court reviewed the County's action pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). This rule requires the Circuit Court to determine (1) whether procedural due process was accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982). By affirming the County's action, the Circuit Court necessarily determined that no procedural due process violation had occurred. Under the *Rooker-Feldman* doctrine, this Court may not re-determine whether Plaintiff's procedural due process rights were violated. *Baggs v. City of South Pasadena*, 947 F.Supp. 1580, 1583 (M.D. Fla. 1996). Accordingly, the Court will dismiss Plaintiffs' procedural due process claim.

Plaintiff's remaining federal claims – equal protection and inverse condemnation – fall within the exception to the *Rooker-Feldman* doctrine, because Plaintiffs did not have a reasonable opportunity to raise these arguments before the Circuit Court. This Court will not have to review the state court judgment to consider these claims.

Similarly, the doctrine of res judicata does not bar Plaintiffs' equal protection and in verse condemnation claims. Res judicata precludes relitigation of claims that were actually litigated or could have been litigated in an earlier suit. Under Florida law, the following elements must be present for the doctrine to apply: 1) identity of the thing sued for, 2) identity of the cause of action, 3) identity of parties, and 4) identity of the quality in the person for or against whom the claim is made. *Albretch v. State*, 44 So.2d 8, 11 (1984). The action before the Circuit Court consisted of a direct appeal from the Board of County Commissioners, where Plaintiffs challenged the propriety of an administrative action. Since that cause of action is different from Plaintiffs' equal protection and inverse condemnation claims, res judicata does not apply.

Finally, the doctrine of collateral estoppel does not apply. Collateral estoppel applies when identical parties wish to relitigate issues that were actually litigated as necessary and material issues in a prior action. *Carson v. Gibson*, 638 So.2d 79, 81 (Fla. 2d DCA 1994). Since none of the issues which must be determined in the equal protection or inverse condemnation claims were actually litigated in the Circuit Court, these claims are not precluded.

b. Preclusive Effects of Prior Litigation on the State Inverse Condemnation Claim

The County contends Plaintiffs' inverse condemnation claim under state law was already litigated before the Circuit Court.[7] This Court disagrees. Under Florida law, Plaintiffs are not barred from bringing an inverse condemnation action after unsuccessfully challenging the propriety of an administrative agency action, judicially or otherwise. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587-88 (11th Cir. 1990); *Albretch*, 444 So.2d at 12-13, *superseded by statue on other grounds as sated in*, *Bowen v. Florida Dep't of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984).

III. Ripeness Considerations

Counts I and II assert causes of action for inverse condemnation under federal and state law, respectively. With respect to the federal claim, Plaintiffs allege that the County deprived them of their property interests without just compensation, pursuant to

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[7] The Court is aware that Plaintiffs raised the takings claims in their Petition for Writ of Certiorari to the Third District Court of Appeal. The County improperly relies on the Petition and on the District Court's denial without opinion of the petition to argue that these issues were previously litigated. A denial without opinion of a petition for certiorari does not constitute an adjudication on the merits. *Don Most Agency, Inc. v. Harrison*, 362 So.2d 56 (Fla. 2d DCA 1978); *Bing v. A.G. Edwards & Sons, Inc.*, 498 So.2d 1279, 1280 (Fla. 3d DCA 1986).

Section 1983 and the Fifth Amendment to the United States Constitution. The Untied States Supreme Court has held, however, that a takings claim under the Fifth Amendment does not become ripe until a plaintiff uses available state law procedures to obtain just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-197 (1985); *see also New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1089 (11th Cir. 1996). The rationale behind this holding is that the Fifth Amendment does not proscribe the taking of property; rather, it proscribes the taking of property without just compensation. *Hamilton Bank*, 473 U.S. at 194 (emphasis added).

Since Plaintiffs have not pursued their state in verse condemnation claim in the Florida courts, the Court will dismiss the federal claim (Count I) without prejudice.

IV. Dismissal under Rule 12(b)(6)

The County has moved to dismiss Plaintiff's equal protection claim (Count III) for failure to state a claim under Fed. R. Civ. P. 12(b)(6). When considering the County's motion, the Court must construe the Complaint in the light most favorable to the Plaintiffs and take its allegations of material fact as true. *Cannon v. Macon County*, 1 F.3d 1558, 1565 (11th Cir. 1993). The Court's inquiry is directed to whether the allegations in the Complaint constitute a statement of a claim under Fed. R. Civ. P. 8(a). *Investors*

Syndicate of Am., Inc. v. City of Indian Rocks Beach, 434 F.2d 871, 879 (5th Cir. 1970).[8] To state a claim, Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court should not dismiss a complaint for failure to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts'" which would entitle it to relief. *Cannon*, 1 F.3d at 1565 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Plaintiffs' claim that the County deprived them of their equal protection rights in violation of the Fourteenth Amendment fails under Rule 12(b)(6). The Equal Protection Clause requires that all similarly situated persons be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985); *Baggs v. City of South Pasadena*, 947 F.Supp. 1580, 1584-85 (M.D. Fla. 1996); *Moore v. City of Edgewood*, 790 F.Supp. 1561 (M.D. Fla. 1992), *aff'd*, 985 F.2d 578 (11th Cir. 1993). If dissimilarly situated people are treated differently, then there is no equal protection violation. *E & T Realty v. Strickland*, 830 F.2d 1107, 1111 (11th Cir. 1987). Plaintiffs contend the County treated County-owned facilities more favorably than it treated Plaintiffs' facility. Complaint at ¶¶ 98-104; ¶¶ 114-120. However, the factual allegations in the Complaint and the attachments reveal that Plaintiffs' facility was unique in terms of

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[8] Decisions of the Fifth Circuit issued before October 1, 1981 are binding authority in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

its location, mode of operation, and the terms under which it was permitted to operate. *See e.g.*, Complaint at ¶ 7 (goal was to build a demonstration facility as a model), 21-23 (proposal submitted for an "alternative" resource recovery facility), 32 (unusual use zoning required), and 35 (unusual use granted subject to conditions). Based on these allegations, it appears Plaintiffs' facility and the County's facilities are not similarly situated. Accordingly, this Court concludes that Plaintiffs have failed to state an equal protection claim under Rule 12(b)(6).

V. State Law Claims

Since the Court has dismissed the federal claims, it must now decide whether to exercise jurisdiction over the remaining state law claims – Counts II and VI-VIII. A federal court may decline to exercise jurisdiction where principles of judicial economy, convenience, fairness, and comity favor proceeding in state court. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). In particular, where the federal claims are dismissed before trial, the federal district court should dismiss the state claims, as well, *Id.* at 350 n.7.

Plaintiffs argue the Court may exercise jurisdiction based on 28 U.S.C. § 1334(b) because this case relates to their bankruptcy proceeding. However, 28 U.S.C. § 1334(c)(1) permits the district court to abstain from hearing a particular proceeding "in the interest of justice or in the interest of comity with

state courts or respect for state law." Given that the controlling law in this action is Florida state law, the factors in Section 1334(c)(1) weigh in favor of abstention. Accordingly, the Court declines to exercise jurisdiction over the state claims.

VI. Conclusion

Accordingly, for the reasons stated in this order, it is

ORDERED AND ADJUDGED as follows:

(1) Count I is DISMISSED WITHOUT PREJUDICE as unripe;

(2) Count III is DISMISSED for failure to state a claim;

(3) Count IV is DISMISSED under the *Rooker-Feldman* doctrine;

(4) Counts II, VI, VII and VIII are DISMISSED, as the Court declines to exercise jurisdiction over them;

(5) This case is CLOSED. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of ~~August~~ [Sept.] 1997.

/s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

cc:
Robert A. Ginsburg, Esq.
Robert Krawcheck, Esq.
Leslie Lupert, Esq.
Joseph Beasley, Esq.
Chesterfield Smith, Esq.

APPENDIX E

AGRIPOST, INC., a Florida corporation, and Agri-Dade, Ltd., a Florida limited partnership, Appellants,

v.

METROPOLITAN MIAMI-DADE COUNTY, through its Manager and Board of County Commissioners, Appellee.

No. 3D01-1898.

District Court of Appeal of Florida,
Third District.

March 26, 2003.

Rehearing Denied May 28, 2003.

Orans, Elsen & Lupert; Josephs, Jack & Gaebe, Coral Gables, and Joseph W. Beasley, for appellants.

Holland & Knight and Daniel S. Pearson; Robert A. Ginsburg and Robert L. Krawcheck and James J. Allen, Miami, for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

COPE, J.

Agripost, Inc. and Agri-Dade, Ltd. appeal an adverse summary judgment in their suit against Miami-Dade County for inverse condemnation, breach of contract, and violation of section 403.7063, Florida Statutes (1989). We affirm.

I.

In 1986, Miami-Dade County "sought proposals for the construction and operation of a waste disposal plant that would create an environmentally safe, useful end product from the County's solid waste. Agripost submitted a proposal, which the Board [of County Commissioners] subsequently accepted." *Agripost, Inc. v. Miami-Dade County,* 195 F.3d 1225, 1227 (11th Cir.1999).

In 1987, Agripost subleased a twenty-acre site from the Florida Department of Health and Rehabilitative Services for construction of the waste disposal plant. The site was near an elementary school and other public institutions.

Because the property was zoned for agricultural use, Agripost obtained a conditional, revocable unusual use zoning approval. There were a number of conditions, and the unusual use was revocable upon violation of the conditions. Among the conditions was the prohibition of any nuisance on the property. Agripost had made assurances that its process would prevent any odor problem associated with the facility.

Soon thereafter, the County entered into a contract with Agripost to supply garbage to the facility for processing. The County was to pay a fee to Agripost, called a "tipping" fee, per ton of garbage supplied. Under the contract, the County had no financial responsibility for the design, construction, or operation of the facility.

The contract provided that "[o]bjectionable odors should not be detected at the company's property limits as a result of the processing operation. . . . Continual generation of obnoxious odors, if not corrected within a reasonable time after written notice by the County, shall constitute a default by Agripost."

As summarized in an opinion in related litigation:

> Agripost's facility began operating in the fall of 1989, and soon thereafter, area residents began complaining that finely ground waste particles were emanating from the plant and that a vile stench covered the area. According to officials from an adjacent elementary school, a "black, thick glue-like mold" was covering nearly every surface of the school, and students and teachers alike were developing various illnesses.
>
> In October 1990, [the County Department of Environmental Resource Management ("DERM")] informed Agripost that its facility was creating a nuisance; DERM alleged both that noxious odors were emanating from the plant, and that Agripost was storing waste products in a manner contrary to the conditions of its permit and in a location other than that prescribed by the plot use plan.

Agripost, 195 F.3d at 1228.

Agripost submitted a plan to the County to correct the cited problems. This involved modifications to the

existing facility to improve odor control. The proposal included expansion of the site to include an adjacent thirty acres, to which some of the operations would be relocated.

The important point for present purposes is that Agripost proposed to pay for these changes by increasing the tipping fee that the County paid to Agripost.

In December 1990, Agripost's package of curative measures was presented to the County's Commission for approval. At that meeting, the Agripost president informed the County Commission that the plant would not continue to operate "if we don't pass the things that are before you today." After a public hearing, the County Commission voted to reject the Agripost modification proposal, and directed County officials to initiate proceedings before the Zoning Appeals Board to revoke Agripost's conditional zoning.

In 1991, the Zoning Appeals Board concluded after a hearing that Agripost had violated the conditions of its unusual use permit, and revoked it. This ruling was affirmed by the County Commission as well as a three-judge panel of the Appellate Division of the Circuit Court. This court denied Agripost's petition for certiorari review without opinion. *Agri-Dade, Ltd. v.*

Metropolitan Dade County, 605 So.2d 1272 (Fla. 3d DCA 1992). Agripost ceased operations.[1]

In 1994, Agripost brought an inverse condemnation suit against the County in the United States District Court for the Southern District of Florida. Agripost alleged that by revoking the unusual use zoning permit, the County deprived Agripost "of all economically viable use of its leasehold interests, of its facility, and of its rights under the Agreement." *Agripost,* 195 F.3d at 1228. "The district court dismissed Agripost's takings claim as unripe because Agripost had failed to pursue Florida's inverse-condemnation remedy." *Id.* at 1227. The United States Court of Appeals for the Eleventh Circuit affirmed. *Id.* at 1233-34.

In 1997, after the federal district court ruled, Agripost filed the instant action in state court. Agripost has alleged a claim under the Florida Constitution for inverse condemnation (count one); breach of contract (count two); and violation of section 403.7063, Florida Statutes (count three). In count four, Agripost states that it intends to reserve an inverse condemnation claim under the federal Constitution to be pursued in the federal court, should this lawsuit be unsuccessful. *See Agripost,* 195 F.3d at 1227, 1229-30, 1233-34; *Fields v. Sarasota Manatee*

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[1] Agripost filed for bankruptcy protection. The only asset of the bankruptcy estate is its claim against Miami-Dade County.

Airport Authority, 953 F.2d 1299, 1305-06 (11th Cir.1992).

The trial court entered summary judgment in favor of the County, and Agripost has appealed.

II.

In the context of a federal inverse condemnation claim, it has been said, "Generally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n,* 38 F.3d 603, 606 (D.C.Cir.1994) (citations omitted); *see also Smalleylogics Corp. v. Dade County,* 176 So.2d 574, 578 (Fla. 3d DCA 1965). We follow that principle here in the context of the inverse condemnation claim under the Florida Constitution.

In the present case Agripost obtained an unusual use zoning approval which was conditional and revocable. The County brought revocation proceedings against Agripost for violation of the prescribed conditions. The Zoning Appeals Board revoked the unusual use zoning approval, and the revocation was upheld in the subsequent administrative and judicial review. Since the zoning approval was conditional and revocable, and Agripost violated the conditions, it follows that the revocation of the permit did not amount to a compensable taking for inverse condemnation

purposes. *Democratic Central Committee; see Smalleylogics.*

Agripost argues, however, that under its contract with the County, it was entitled to a reasonable opportunity to cure the violation of the zoning conditions. Agripost correctly states that the contract had a cure provision. Agripost contends that the County Commission was obligated to accept Agripost's proposal to solve the odor problem. Agripost argues that in rejecting the proposal, the County breached the contract. We disagree.

Agripost's proposal was not a straightforward plan to accomplish a cure at Agripost's expense. Instead, Agripost proposed to pay for the facility modifications by charging higher fees to the County than were called for under the existing contract.

In his oral presentation to the County Commission, the Agripost president indicated that Agripost would not continue to operate unless the County agreed to the package of proposed modifications. The County Commission was certainly within its rights in rejecting a proposal that in substance required the County to pay Agripost more money to cure the odor problem.[2]

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[2] Although we need not reach it, the County also argues that the Commission was well within its rights in rejecting the proposal to expand the facility by an additional thirty acres, given the already severe odor problems on the existing twenty.

It would present different issues if Agripost had simply requested forbearance by the County for a reasonable time so that Agripost could correct the facility problems at its own expense. That was not, however, Agripost's proposal. The trial court correctly rejected the breach of contract claim.

Agripost maintains that the County violated section 403.7063, Florida Statutes, which states in part that "no county or municipality shall adopt or enforce regulations that discriminate against privately owned solid waste management facilities because they are privately owned." Agripost argues that at the time relevant here, the County was paying a higher tipping fee at other facilities. Assuming that is so, there is no statutory violation. The statute does not provide a right to increase a contractually negotiated fee.

Affirmed.

APPENDIX F

Supreme Court of Florida
WEDNESDAY, OCTOBER 15, 2003

CASE NO.: SC03-1181
Lower Tribunal No.: 3D01-1898

AGRIPOST, INC., ETC., ET AL.	vs.	METROPOLITAN MIAMI-DADE COUNTY, ETC.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall (SEAL)
Thomas D. Hall
Clerk, Supreme Court

mc
Served:

JOSEPH WAYNE BEASLEY
ROBERT L. PLOTZ
LESLIE A. LUPERT
SHELDON H. ELSEN
JOHN J. MONTONE
ROBERT L. KRAWCHECK
JAMES J. ALLEN
DANIEL S. PEARSON
HON. MARY CAY BLANKS, CLERK
HON. HARVEY RUVIN, CLERK
HON. GERALD D. HUBBART, JUDGE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-16499-DD

AGRIPOST, LLC,
a Florida Limited Liability Company,
(successor by merger to Agripost, Inc.),
AGRI-DADE, LTD., a Florida limited partnership,

Plaintiffs-Appellants,

versus

MIAMI-DADE COUNTY, FLORIDA,
a political subdivision of the State of Florida,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed May 30, 2008)

BEFORE: TJOFLAT, HULL and BOWMAN,* Circuit Judges.

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* Honorable Pasco M. Bowman II, United States Circuit Jude [sic] for the Eight [sic] Circuit, sitting by designation.

PER CURIAM:

The petition for rehearing filed by Appellants Agripost, Inc., is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE